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No. 00-152

In The

Supreme Court of the United States

VICTORIA L. BRADSHAW, *et al.*,

Petitioners,

vs.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE THE PORT OF OAKLAND AND TEN CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to Rule 37 of this Court, the Port of Oakland, and the cities of Berkeley, Newport Beach, Bakersfield, San Pablo, Sunnyvale, Redding, Lodi, Oakland, Fremont and Tracy ("Amici") move for leave to file the accompanying brief of Amici Curiae in support of Petitioners, Victoria Bradshaw, et al.[1]

Counsel for Amici requested that counsel for Petitioners and Respondent consent to the filing of this brief pursuant to Rule 37. Counsel for Petitioners consented. However, counsel for Respondent declined on the ground that this brief addresses an issue not presented by the decision below. Amici respectfully disagree with Respondent's conclusion and therefore move this Court for leave to file the accompanying brief.

Amici are all public entities that enter into numerous public works contracts in order to construct and maintain vital infrastructure. Because Amici may be directly affected by the decision below, Amici seek to assist this Court in understanding the public interest in resolving a conflict among the circuit courts on an issue of overriding national importance. Amici respectfully submit that additional briefing on this matter is desirable and that, based

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[1] The City Charter of the City of Oakland establishes two legislative bodies to govern municipal affairs: 1) the City Council and 2) the Board of Port Commissioners. (Charter, Art. VII.) The Board of Port Commissioners possesses exclusive control over the city's maritime and aviation operations, and speaks for the city with respect to such matters. (*City of Oakland v. Hogan*, 41 Cal.App.2d 333, 342-345, 106 P.2d 987 (1940).)

on their experience, they may assist this Court in making a sound decision.

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BRIEF OF AMICI CURIAE THE PORT OF OAKLAND AND NINE CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

The Port of Oakland and the cities of Berkeley, Newport Beach, Bakersfield, San Pablo, Sunnyvale, Redding, Lodi, Oakland, Fremont and Tracy ("Amici") submit this brief of amici curiae in support of petitioners Victoria Bradshaw, et al.

STATEMENT OF AMICI CURIAE[1]

A. Identity of Amici

Amici are ten California public entities responsible for building and maintaining roads, bridges, buildings, harbors and airports for use by the public. In fulfilling these responsibilities, Amici award and execute numerous public works contracts in the manner specified by state law and local charters.

B. Interest of Amici

Amici have concluded that this case presents an issue of exceptional importance to municipalities because the holding that an ordinary public works contract creates a protected property interest under the Fourteenth Amendment to the U.S. Constitution is contrary to established precedent in the Second and Third Circuits, and fails

[1] No person or entity, other than Amici, or their counsel, made any monetary contribution to the preparation and submission of this brief.

even to follow long-established precedent in the Ninth Circuit. Moreover, the majority's deviation from established Fourteenth Amendment jurisprudence holds the potential to open an entirely new realm of municipal liability. All cities utilize contractors to deliver municipal services; indeed some cities use contractors for all of their services. (See, Miller, *Cities by Contract: The Politics of Municipal Incorporation*, MIT Press (Cambridge, Mass. 1981).) Unfortunately, disputes with contractors are an unavoidable part of contemporary public works administration. (See, Martin, *Management of Public Works Construction Projects*, pp. 121-122, American Public Works Assoc. (Kansas City, Mo. 1999).) However, if the conflict between the majority decision and established precedent is not resolved, the federal judiciary will become entangled in ordinary public works contract disputes. Moreover, state and local governmental agencies will face the threat of a federal civil rights suit, and a potential attorney fee award under 42 U.S.C. § 1988, in every dispute with a contractor.

C. Source of Authority

Amici are authorized by state law or local charter to participate in any judicial proceedings related to their operations. This brief is filed under the authority of Rule 37.

SUMMARY OF ARGUMENT

The decision below concerns an issue of national importance and conflicts with the decisions of the Courts of Appeals for the Second and Third Circuits; consideration by this Court is therefore necessary to secure and maintain uniformity of the interpretation of the Fourteenth Amendment to the U.S. Constitution. The decision below presents a question of exceptional importance because by holding that an ordinary commercial contract with a public agency creates a property interest within the meaning of the Fourteenth Amendment, it will result in a federal cause of action for every breach of a public contract. Moreover, the decision below will seriously impede the development and maintenance of vital public infrastructure.[2]

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[2] Amici agree with Petitioner's argument that G & G failed to prove the required element of state action as necessitated by *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). However, as Amici explain, the majority opinion is also fatally flawed in that it holds that an ordinary commercial contract with a public entity creates a protected property interest, sufficient to create a federal cause of action in an ordinary contract dispute.

I.

THE DECISION BELOW CONFLICTS WITH PRECEDENTS OF THE SECOND AND THIRD CIRCUITS, AND EVEN FAILS TO FOLLOW BINDING PRECEDENTS OF THE NINTH CIRCUIT ITSELF, ALL OF WHICH HOLD THAT AN ORDINARY COMMERCIAL CONTRACT WITH A PUBLIC ENTITY DOES NOT CREATE A PROTECTED PROPERTY INTEREST UNDER THE FOURTEENTH AMENDMENT

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'." (*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 990, 143 L.Ed.2d 130 (1999).) In the decision below, the majority concluded that a corporation's public works contract created a protected property interest under the Fourteenth Amendment. The majority holding conflicts with prior precedent from Second and Third Circuits, and fails even to follow binding precedent from the Ninth Circuit.

The Court of Appeals for the Second and Third Circuits have held that an ordinary commercial contract with a public entity does not create a property interest protected by due process. (*S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962 (2nd Cir. 1988); *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1397-1400 (3d Cir. 1991); *Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26 (2nd Cir. 1994).) Prior to the issuance of the decision below, Ninth Circuit precedent had also rejected any theory that an ordinary public contract created a protected property interest. (*San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d

1404 (9th Cir. 1987).) *S & D, Unger, Martz* and *San Bernardino Physicians* are each authoritative decisions in that a central issue on appeal was the existence of any protected property interest created by an ordinary commercial contract with a public entity and in each case the court's holding is supported by a thorough analysis of the relevant authorities.

In *S & D, supra,* the Second Circuit considered whether a municipal contract to maintain parking meters in New York City created a protected property interest. There, the city withheld payments and eventually terminated the contract under a no-cause termination provision in the contract. After exhaustive analysis, the panel unanimously held that S & D's contract created no property interest under the Fourteenth Amendment: "[A]n interest in enforcement of an ordinary commercial contract with the state is *qualitatively different* from the interests the Supreme Court has thus far viewed as 'property' entitled to procedural due process protection." (*S & D, supra,* 844 F.2d, at 966 [emphasis added].)

In *Unger, supra,* the plaintiff alleged that a public medical school deprived her of a protected property interest when it discontinued its residency program after it had accepted her application. After an extensive review of the other federal precedents, including the Ninth Circuit's opinion in *San Bernardino Physicians, supra,* the Third Circuit held that the plaintiff's contract with the medical school created no protected property interest. (*Unger, supra,* 928 F.2d, at 1399.)

In *Martz, supra,* the plaintiff attorney had been retained to provide legal services for a municipality. As a

result of a dispute, the village failed to compensate the plaintiff for the services rendered and she filed an action under 42 U.S.C. § 1983 ("Section 1983") alleging deprivation of her property in violation of the Fourteenth Amendment. Reiterating its holding from *S & D, supra,*, the court rejected the plaintiff's Section 1983 claim, explaining that the right to payment on an ordinary commercial contract does not rise to the level of a constitutionally protected property interest. (*Martz, supra,* 22 F.3d, at 31; citing, *San Bernardino Physicians, supra.*)

The Ninth Circuit's decision below fails even to follow the binding precedent from that circuit in *San Bernardino Physicians, supra.* There, a medical services corporation entered a contract with the county which could be terminated only "for cause." (*Id.*, at 1406.) However, the county breached the contract by terminating it prematurely. The medical group filed an action under Section 1983 alleging deprivation of property without due process of law under the Fourteenth Amendment. On appeal from summary judgment in favor of the county, the Ninth Circuit held the medical services contract was an ordinary commercial contract which did not create a protected property interest.

In its analysis, the Ninth Circuit acknowledged that a contract may, in some circumstances, create a protected property interest. But, recognizing the practical problems with conferring constitutional protection on every public contract, the Court set out to "determine what kinds of contracts with the state create rights that are protected by the Fourteenth Amendment." (*Id.*, at 1409.) Essential to the court's determination was the fact that employment

contracts, which have been the basis for nearly all successful contract-based Section 1983 actions, relate to an interest of overriding importance to *the individual.* Employment is more easily characterized as a civil right than the transitory business interest embodied in an ordinary commercial contract. Therefore, an ordinary commercial contract does not create a protected property interest simply because one party is a public entity. Of special significance to the instant matter, the court observed:

> . . . Physician's Group's contract to supply medical services to the state does not confer any constitutionally protectible interest on Physician's Group . . . [I]ts contract to supply services to the state cannot sensibly be distinguished from *construction contracts* or even purely material supply contracts, for purposes of federal protection. (*San Bernardino Physicians, supra,* 825 F.2d, at 1410 [emphasis added].)

The majority opinion in *G & G Fire Sprinklers* does not respect the carefully crafted reasoning of the authoritative decisions from the Second and Third Circuits. (See, *G & G Fire Sprinklers, supra,* 156 F.3d, at 908-909 [Kozinski, J., dissenting].) Nor does the decision below follow binding Ninth Circuit precedent. In each prior case, plaintiffs alleged the deprivation of a protected property interest arising from an ordinary commercial contract with a public entity. Indeed, the *San Bernardino Physicians* court specifically identified "construction contracts", such as the G & G contract, to illustrate the types of contracts which *do not* create a protected property interest. (*San Bernardino Physicians, supra,* 825 F.2d, at 1410.) Even the

inclusion of a "for cause" termination provision did not warrant a different result in *San Bernardino Physicians*.

The decision in *G & G Fire Sprinklers* cannot be reconciled with the above authorities. In the decision below, the majority's attempt to avoid a conflict with other circuits by focusing on the statutory scheme of the California Labor Code, rather than the terms of the contract, is simply unavailing. (*G & G Fire Sprinklers v. Bradshaw*, 204 F.3d 941, 943 (9th Cir. 2000).) Clearly, G & G's property interest did not arise from the Labor Code itself. Similarly, characterizing G & G's property interest as an expectation of receiving payment is insufficient, since any such expectation must be rooted in the contract. In its original decision, the majority itself noted that "G & G's interest arises from its public works contract." (*G & G Fire Sprinklers, supra*, 156 F.3d, at 901.) This result cannot be squared with the precedents in *S & D, Unger, Martz* and *San Bernardino Physicians*.

In sum, the majority opinion creates an irreconcilable conflict with Second and Third Circuit precedents by recognizing a protected property interest arising out of an ordinary commercial contract with a public entity. This Court should grant the writ in order to resolve this conflict.

II.

THE DECISION BELOW WILL ENTANGLE THE FEDERAL JUDICIARY IN STATE AND LOCAL PUBLIC WORKS CONTRACT DISPUTES.

As a practical matter, the decision below will entangle the federal judiciary in disputes between state and

local governments, on the one hand, and public works contractors on the other, by converting a broad range of ordinary contract disputes into civil rights actions.

Over twenty years ago, this Court expressed a concern that the day-to-day operations of state and local governments may become subject to constitutional review as the result of a limitless definition of "property interests." In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), county law enforcement officials distributed flyers to local merchants depicting the plaintiff among a list of "active shoplifters." The plaintiff filed suit against the officials under 42 U.S.C. § 1983, alleging that the county had deprived him of his protected liberty and property interests without due process of law. In rejecting this claim, this Court observed:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and sheparded the adoption of that Amendment to learn that it worked such a result, a study of our decisions convinces us they do not support the construction urged by respondent. (*Paul, supra*, 424 U.S., at 698-699, 96 S.Ct., at 1159, 47 L.Ed.2d 405.)

The identical concern expressed by this Court in *Paul v. Davis* is presented in the decision below. To paraphrase this Court's holding in *Paul v. Davis*, the Ninth Circuit's reasoning would seem almost necessarily to result in

every breach of a public works contract by a state or local agency establishing a violation of the Fourteenth Amendment. As noted by Judge Kozinski, the result adopted by the majority opinion will effectively "constitutionalize" a broad swath of garden variety contract disputes simply because one of the parties is a government agency. (See e.g., *G & G Fire Sprinklers, supra,* 156 F.3d, at 909.) At least 16 other federal judges have expressed the same concern.[3]

III.

THE DECISION BELOW WILL SERIOUSLY IMPEDE THE DEVELOPMENT AND MAINTENANCE OF VITAL PUBLIC INFRASTRUCTURE BY CONVERTING ORDINARY CONTRACT DISPUTES INTO FEDERAL CIVIL RIGHTS CLAIMS WHICH ALLOW FOR INDIVIDUAL LIABILITY AND PREVAILING PLAINTIFF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

In his dissenting opinion in the original *G & G Fire Sprinklers* decision, Judge Kozinski identified with striking clarity the detrimental impact the majority opinion will have on state and local governments. (*G & G Fire Sprinklers, supra,* 156 F.3d, at 909-910.) Amici shares Judge Kozinski's concern that the majority holding will hobble

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[3] See, *S & D, supra,* 844 F.2d 962 [Feinberg, Newman, Winter, JJ.]; *Unger, supra,* 928 F.2d 1392 [Hutchinson, Resenn, JJ.]; *Martz, supra,* 22 F.3d 26 [Miner, Mahoney, Restani, JJ.], *San Bernardino Physicians, supra,* 825 F.2d 1404 [Hug, Canby, Norris, JJ.]; *Walentas v. Lipper,* 862 F.2d 414 (2nd Cir. 1988) [Mahoney, Winter, JJ.]; *Reich v. Beharry,* 883 F.2d 239 [Seitz, Stapleton, Cowan, JJ.].

the ability of public entities to construct and maintain vital public improvements.

Two aspects of Section 1983 liability will fundamentally alter the dynamics of public works administration to the detriment of the public. First, the decision below will discourage vigorous protection of the public fisc by permitting imposition of individual liability upon project managers, engineers and administrators. (See, e.g., *Hafer v. Melo,* 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).) As noted by Judge Kozinski, "when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands." (*G & G Fire Sprinklers, supra,* 156 F.3d, at 910, n.2.) Self-evidently, the prospect of individual liability under Section 1983 will discourage public works managers from vigorously enforcing the terms of commercial contracts in order to obtain complete performance. The taxpayers will bear the consequences in the form of higher costs and delayed completion of critical public improvements.

Second, as the instant case illustrates, liability under Section 1983 carries with it the right to prevailing plaintiff attorney's fees under 42 U.S.C. § 1988. Under California law, parties to an ordinary breach of contract action are entitled to recovery of attorney's fees only if their contract specifically provides such a remedy. (Cal. Civ. C. § 1717 (Deerings 1994); *Excess Electronixx v. Heger Realty Corp.,* 64 Cal.App.4th 698, 75 Cal.Rptr.2d 376.) However, as a practical matter, the majority opinion may result in the imposition of a significant contract remedy in every public works contract, regardless of the mutual assent of the parties.

The contours of the expanded zone of Section 1983 liability which might result if this conflict is not resolved are suggested by the frequency with which payments are withheld from contractors in the course of a construction project. The withholding or partial withholding of payments by a project owner is an inherent feature of construction projects, whether privately or publicly owned. (See, Sweet & Sweet, *Sweet on Construction Industry Contracts-Major AIA Documents*, § 15.11 (4th Ed.) Aspen Law & Business 1999.) Moreover, in California numerous statutes authorize or require state and local agencies to withhold funds from a contractor for such reasons as failure to execute a contract after award (Cal. Pub. Con. C., §§ 10164, 10781, 10782, 20103.5, 20172, 20418 (Deerings 1994)), as liquidated damages (Cal. Pub. Con. C. §§ 10226, 10826 (Deerings 1994), see also, Cal. Comm. C. § 2717), due to disputes regarding amounts due (Cal. Pub. Con. C. § 7107, § 10262.5 (Deerings 2000 supp.)), and in order to protect the rights of a subcontractor or supplier (Cal. Civ. C. § 3186 (Deerings 2000 supp.)). Indeed, the construction industry's own standard contract specifications make frequent use of this commercially accepted practice. (Public Works Standards, Inc., *Greenbook: Standard Specifications for Public Works Construction* (2000 ed.) § 4-1.1 (deduction for defective materials or work); § 6-2 (deduction for failure to provide for public safety, traffic and protection of work); § 6-9 (liquidated damages) (BNI Publications, Los Angeles, 1999).)

CONCLUSION

The Court should intervene now and halt any further propagation of the mistaken notion that an ordinary public works contract creates a protected property interest under the Fourteenth Amendment. Based on the foregoing, Amici urge the Court to grant the Petition for Writ of Certiorari and reverse the Court of Appeals decision.

Dated: August 25, 2000

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